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No. 99-143

In the Supreme Court of the United States

AVONDALE FEDERAL SAVINGS BANK,

Petitioner,

v.

AMOCO OIL COMPANY, a Maryland corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT REQUIRED BY RULE 29.6

BP Amoco p.l.c., BP Amoco Corporation, and BP Amoco Company are the parent companies of Amoco Oil Company.

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COUNTERSTATEMENT OF THE CASE

This case presents the question of whether the citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 9672 ("RCRA § 7002"), provides a cost recovery remedy that would allow a private party to recover costs incurred remediating petroleum-contaminated property after a complaint had been filed.[1] Because of certain omissions in the Statement of the Case of Petitioner, Manufacturers Bank, f/k/a Avondale Federal Savings Bank ("Avondale"),[2] Amoco Oil Company ("Amoco") hereby submits its own statement so that this Court will have before it all facts pertinent to the disposition of this petition.

After owning a gasoline service station for several years, Amoco, in 1970, razed the property and sold it.

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[1] Amoco objects to a number of the factual misstatements in Avondale's Question Presented. Petition for Writ of Certiorari (hereinafter "Pet.") at i. The Court of Appeals properly noted that Avondale "got antsy" and "made a business decision to clean up the property quickly. . . ." *Avondale Fed. Sav. Bank v. Amoco Oil Co.*, 170 F.3d 692, 694-95 (7th Cir. 1999); Appendix A to Avondale's Petition ("App.") at 5a. Moreover, Avondale found contamination in November, 1995, but did not commence its cleanup until May, 1996. Thus, Avondale did not act "unofficiously in an emergency." As the District Court noted, Amoco requested both additional information and an opportunity to participate in the removal of underground storage tanks, and, therefore, did not "refuse[ ] to act," as the Question Presented suggests. The district court also made no finding that Amoco caused the contamination. Such inaccuracies in the Question Presented are sufficient reason to deny Avondale's petition. Sup. Ct. R. 14(4).

[2] According to their Rule 29.6 statement, Avondale Federal Savings Bank merged into Manufacturers Bank while this case was pending. For the sake of consistency, Amoco will refer to the Petitioner as "Avondale."

Avondale's predecessor acquired the property in July, 1975. In December, 1982, Avondale became the owner of the property through a merger. In September, 1995, in anticipation of selling the site, Avondale began conducting an environmental investigation of the site.

In November, 1995, during the course of its environmental investigation, Avondale discovered contamination, including petroleum contamination. On January 22, 1996, Avondale served Amoco and the necessary government officials with a 90-day "Notice of Endangerment and Notice of Intent to Sue" ("90-day notice"), as required by RCRA, 42 U.S.C. § 6972(b)(2)(A). On February 12, 1996, Amoco responded to Avondale's 90-day notice letter and requested copies of environmental reports related to the site. Shortly thereafter, Amoco requested that Avondale provide Amoco with results from chemical analyses of samples taken at the site, as well as certain information related to other nearby petroleum spills that had been reported. Avondale provided the information to Amoco on May 9, 1996, only after having filed its Complaint the previous day.

Under the terms of its sales agreement with its buyer, Avondale was required both to remediate any contamination located on the site to the State's most stringent residential cleanup requirements and to obtain a letter from the Illinois Environmental Protection Agency ("IEPA") confirming that no additional remediation was required on the site. Avondale began remediating the site shortly after serving its complaint upon Amoco.

On November 20, 1996, during the pendency of this suit, Avondale received a letter from the IEPA approving the site remediation and signifying that no further re-

mediation was required at the site pursuant to the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* Having received the IEPA's letter, Avondale moved to strike certain of Amoco's affirmative defenses, which asserted that Avondale could not recover costs under RCRA, and that Avondale's completion of the remediation had rendered the case moot, because cost recovery was not available under RCRA. Amoco then moved for summary judgment, asserting that Avondale's RCRA claim should be dismissed as moot because RCRA § 7002 did not provide for cost recovery, the sole remedy available to Avondale at the time.

The District Court granted Amoco's Motion for Summary Judgment "to the extent that Avondale [sought] recovery of the cleanup costs it incurred after properly invoking RCRA's statutory process," and dismissed the RCRA claim along with two state law claims for which the Court declined supplemental jurisdiction. *Avondale Fed. Sav. Bank v. Amoco Oil Co.*, 997 F.Supp. 1073, 1079 (N.D. Ill. 1998), *aff'd,* 170 F.3d 692 (7th Cir. 1999); App. C at 31a. On March 11, 1999, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's decision, and held that RCRA does not permit the recovery of cleanup costs incurred after a RCRA complaint has been filed. *Avondale Fed. Sav. Bank v. Amoco Oil Co.*, 170 F.3d 692 (7th Cir. 1999); App. A. The Seventh Circuit held that "Avondale has a number of state law recovery theories available to it . . .," but Avondale could not get money from Amoco "in this court and not under RCRA." *Id.* at 695; App. A at 5a-6a. On April 20, 1999, the Seventh Circuit denied Avondale's Petition for Rehearing with Suggestion for Rehearing *En Banc*. App. D.

REASONS FOR DENYING THE WRIT

I. AVONDALE PRESENTS NEITHER A CONFLICT NOR AN IMPORTANT QUESTION

In the opinion below, the Seventh Circuit concluded that RCRA's citizen provision does not provide for the equitable remedy of restitution. *Avondale Fed. Sav. Bank v. Amoco Oil Co.*, 170 F.3d 692, 695 (7th Cir. 1999); App. A at 5a. In reaching its conclusion, the Seventh Circuit relied primarily on this Court's decision in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), in which this Court directly addressed the availability of restitution under RCRA's citizen suit provision. *Id.* Avondale now complains the Seventh Circuit wrongly decided the matter and seeks certiorari. Avondale's supporting arguments are unavailing, as no conflict between courts exists and Avondale has otherwise failed to articulate any of the reasons this Court characteristically considers in allowing a petition for certiorari. Sup. Ct. R. 10.

Avondale seeks review of the Seventh Circuit's decision on three grounds. First, Avondale argues that the Seventh Circuit's decision is in conflict with prior Seventh Circuit decisions and decisions of this Court which address the scope of a district court's equitable jurisdiction. Second, Avondale argues that the question of whether cost recovery is available under RCRA is important to the integrity of RCRA's administration. Finally, Avondale argues that the Seventh Circuit's decision somehow conflicts with this Court's decision in *Meghrig* by confusing the distinction between "causes of action" and "remedies." Avondale's entreaties are misplaced. As discussed below, no conflict exists and this Court has already held

that private party cost recovery was unimportant to the RCRA program. *Id.* at 483.

Avondale has failed to articulate the existence of a "conflict with the decision of another United States Court of Appeals on the same important matter." Sup. Ct. R. 10(a). Indeed, it cannot. The Seventh Circuit's decision below was the first decision of a United States Court of Appeals to address the issue presented in this case. Further, that decision tracked carefully the findings and rationale of this Court in *Meghrig*. Moreover, the Seventh Circuit's decision below is consistent with all of the district court decisions addressing this issue. Avondale's petition omits entirely any mention of the numerous other district courts interpreting RCRA in the identical manner to which the lower court did here. *See, e.g. United States v. Domestic Indus., Inc.*, 32 F.Supp.2d 855, 871 (E.D. Va. 1999) (dismissing claim for indemnity and contribution under RCRA citizen suit); *Davenport v. Neely*, 7 F.Supp.2d 1219 (M.D. Ala. 1998) (dismissing contribution claim brought by party sued by government under RCRA § 7003); *City of Oakland v. Keep On Trucking Co., Inc.*, No. 95-03721 CRB, 1998 WL 470465 (N.D. Cal. Jul. 30, 1998); *Ergon, Inc. v. Amoco Oil Co.*, 966 F.Supp. 577 (W.D. Tenn. 1997); *Express Car Wash Corp. v. Irinaga Bros., Inc.*, 967 F.Supp. 1188 (D. Or. 1997); *Andritz Sprout-Bauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609 (M.D. Pa. 1997); *Agricultural Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co.*, No. 95 C 3681, 1996 WL 515088 (N.D. Ill. Sept. 6, 1996). The overwhelming consensus in the lower courts that RCRA does not provide the remedy Avondale seeks clearly indicates a lack of a conflict on an important issue of federal law, which is

necessary for this Court to allow a petition for writ of certiorari.

Similarly, Avondale mistakenly maintains that the issue of the availability of cost recovery is important to implementation of RCRA. Pet. at 10. In *Meghrig*, this Court addressed the importance of private party cost recovery to RCRA and found it unavailable, noting "RCRA is not principally designed . . . to compensate those who have attended to the remediation of environmental hazards." *Meghrig*, 516 U.S. at 483. Not surprisingly, Avondale's discussion of the importance of cost recovery to RCRA omits any reference to *Meghrig*, underscoring the absence of any meaningful argument. There is no important question. It has been decided and decided unfavorably for Avondale by this Court.

In the absence of any conflict or important issue, there is no basis for certiorari.

II. NO EQUITABLE JURISDICTION CONFLICT EXISTS

Avondale asserts that the opinion below conflicts with "this Court's long line of prior rulings on the federal courts' equitable jurisdiction. . . ." Pet. at 5. Evincing the poverty of its argument, Avondale invokes exclusively decisions involving statutes other than RCRA while studiously avoiding any discussion of *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), which expressly addressed the interplay between RCRA and equitable jurisdiction. Pet. at 5-10. Further, the very "long line of prior rulings" referenced by Avondale were explicitly identified and rejected by this Court in *Meghrig*. *Meghrig*, 516 U.S.

at 487-88. Finally, in the opinion below, the Seventh Circuit relied virtually entirely on *Meghrig* in reviewing and denying the availability of equitable jurisdiction to award restitution under RCRA. *Avondale Fed. Sav. Bank v. Amoco Oil Co.*, 170 F.3d 692, 694-95 (7th Cir. 1999). Plainly, there is no conflict.

In *Meghrig*, this Court directly addressed the interplay of equitable remedies, including specifically restitution, and RCRA citizen suits. This Court held that RCRA provides only two remedies: a mandatory injunction or a prohibiting injunction. *Meghrig*, 516 U.S. at 484. The Court declined to allow a restitution remedy, admonishing that with statutes such as RCRA where Congress has enumerated specific remedies, "a court must be chary of reading others into it." *Id.* at 487-88. Moreover, in reaching its holding, this Court specifically addressed and rejected the specific inherent equitable authority argument and cases now advanced by Avondale. Pet. at 5-10; *Meghrig*, 516 U.S. at 487. Plainly this Court concluded that while courts may have broad equitable authority, a statute may circumscribe that authority by specifically enumerating remedies and causes of action. This Court held that RCRA did so, rendering inapposite decisions addressing other statutes. *Meghrig*, 516 U.S. at 487-88. Subsequently, in the opinion below, the Seventh Circuit similarly tracked this Court's *Meghrig* analysis in finding that the limited enumerated remedies available for citizen suits in RCRA precluded restitution. *Avondale Fed. Sav. Bank*, 170 F.3d at 694-95; App. at 3a-6a.

There is no conflict between this Court's *Meghrig* opinion and the Seventh Circuit's decision as to equitable jurisdiction. Avondale has not attempted to demonstrate

the existence of any conflict between them, failing to mention *Meghrig* in its equitable jurisdiction argument. Pet. at 5-10.[3] Rather than focusing on this Court's decision regarding the precise statute and provision at issue here, Avondale opts to raise only decisions involving other statutes. *Id.* Those cases are of little moment when compared to a decision addressing the identical statute, provision and issue. Underscoring the irrelevance of those cases, this Court dispatched their applicability to RCRA in *Meghrig*. *Meghrig*, 516 U.S. at 487. Avondale's efforts to invoke a "long line of prior rulings" regarding other statutes cannot mask the obvious: there is no conflict between this Court and the Seventh Circuit regarding equitable jurisdiction and RCRA.

Unable to show a conflict with *Meghrig*, Avondale attempts to manufacture a conflict with cases such as *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and the so-called "*Porter* rule." Pet. at 7. However, not only did these cases involve entirely different statutes, they are also factually inapposite. In each case, the government, not a private party, was a plaintiff. As noted by the Court in *Porter*, when the government enforces the rights of the public, a court's "equitable powers assume an even more flexible character than when only private controversies are at stake." 328 U.S. at 398. Similarly, this Court noted in *Hecht Company v. Bowles*, 321 U.S. 321, 331 (1944), "the standards of public interest not the requirements of private litigation measure the propriety

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[3] Avondale also fails to mention any of the district court decisions which uniformly are in accord with the Seventh Circuit's decision. See *supra* cases cited in Part I.

and need for injunctive relief in these cases." *Id.* at 331. The very cases cited by Avondale demonstrate their inapplicability in a purely private matter such as the instant case.

The *Porter* decision's inapplicability to a case involving a private party is further highlighted by a case cited by Avondale, *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993). In *Mertens*, this Court was asked to address whether section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA") created a compensatory damages remedy against a non-fiduciary. The majority in *Mertens* recognized that section 502(a)(3) of ERISA contains broad remedial language, authorizing "other appropriate equitable relief," which would arguably encompass the remedy sought by the petitioner: compensatory damages traditionally available in such circumstances in a court of equity. However, the majority of this Court held that the equitable remedies provided by the statute were limited by its language. *Mertens*, 508 U.S. at 258. Specifically, the majority stated that whether the statute clearly barred an equitable remedy was "not the issue;" the issue was, rather, "whether the statute affirmatively authorizes such a suit." *Id.* at 255 n.5. The Seventh Circuit, with reference to *Meghrig*, undertook this precise analysis. *Avondale Fed. Sav. Bank*, 170 F.3d at 694; App. A at 3a-4a. Thus, *Mertens* clearly indicates that the Seventh Circuit's decision does not conflict with this Court's rulings on equitable jurisdiction.

Avondale also cites a number of Seventh Circuit opinions that it claims have relied upon *Porter*. Pet. at 8. However, any potential intra-circuit conflict should be addressed by the Seventh Circuit itself through a rehear-

ing *en banc*, and is not a basis for review by this Court. *See Davis v. United States*, 417 U.S. 333, 340 (1974). Avondale petitioned for an *en banc* rehearing, which was denied on April 20, 1999. App. D. Thus, these cases do not present a basis for this Court to grant review even had Avondale demonstrated the existence of an intra-circuit conflict, which Avondale failed to do.

The cases cited in Avondale's petition do not conflict with the decision of the Seventh Circuit below. Significantly, Avondale does not discuss, much less demonstrate, a conflict with the *Meghrig* decision. Avondale cannot explain the applicability of this Court's prior decisions interpreting remedies available to the government under dissimilar statutory schemes. Avondale has, therefore, failed to demonstrate the importance of this case by reference to the equitable jurisdiction of a district court, and cannot justify this Court's review on that basis.

III. AVONDALE PRESENTS NO ISSUE OF IMPORTANCE TO THE ADMINISTRATION OF RCRA

Avondale argues that certiorari should be granted, because restitution is important to the RCRA program. Pet. at 10. Unfortunately for Avondale, this Court thoroughly discussed RCRA's place in the scheme of federal environmental statutes in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), and held to the contrary. As this Court noted, RCRA's primary purpose was not to "effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards." *Meghrig*, 516 U.S. at 483. This Court

held that RCRA's "primary purpose rather is to reduce the generation of hazardous waste and to ensure the proper treatment, storage and disposal of that waste which is nonetheless generated, so as to minimize the present and future threat to human health and the environment." *Id.* This Court distinguished RCRA from another environmental statute designed to address environmental contamination and hazardous materials: the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* *Id.* at 486. The Court then ruled that restitution was unavailable for the petitioner under RCRA. In so doing, this Court in *Meghrig* determined that the issue of whether cost recovery or restitution is available under RCRA is not critical to the administration and integrity of RCRA.

Avondale ignores that it has a potential remedy under state law to recover its remediation costs. The existence of this possible remedy has been noted both by this Court and the Seventh Circuit. As this Court stated in *Meghrig*, RCRA does not prevent a party such as Avondale from pursuing its remedies under state law. 516 U.S. at 487. Avondale does not address why the potential availability of a state law cost recovery remedy is inadequate for the administration of RCRA. Avondale, therefore, fails to explain adequately the importance of this case to the administration of RCRA.

Furthermore, RCRA provides a remedy that will safeguard human health and the environment: a mandatory injunctive order compelling the abatement of an imminent and substantial endangerment, a fact largely ignored by Avondale in its petition. This remedy is explicitly provided by statute. As the Seventh Circuit noted,

Avondale did not pursue this remedy because it "got antsy." *Avondale Fed. Sav. Bank v. Amoco Oil Co.*, 170 F.3d 692, 694 (7th Cir. 1999); App. A at 5a. Avondale fails to explain, however, why the remedies explicitly provided by Congress, coupled with a possible state law cost recovery claim, are ineffective to protect the administration of RCRA.

Avondale, however, attempts to demonstrate the importance of the question it has posed by reference, not to *Meghrig*, but to the Third Circuit's 1982 opinion in *United States v. Price*, 688 F.2d 204 (3d Cir. 1982). Avondale overlooks that *Price* involved a different question arising under RCRA, *i.e.*, the propriety of injunctive relief issued in favor of the government under RCRA § 7003. The issue of whether cost recovery is available under RCRA § 7002 for the cleanup of petroleum contamination is of little importance to the government, which can seek that precise remedy under Title IX of RCRA, 42 U.S.C. § 6991 *et seq*. Avondale, therefore, fails to demonstrate that cost recovery is important to the administration of RCRA, and has not provided a compelling reason to justify this Court's granting of review.

IV. NO CONFLICT DISTINGUISHING BETWEEN "CAUSE OF ACTION" AND "RELIEF" EXISTS

Finally, Avondale contends there is a conflict between the opinion below and this Court's decision in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996), in improperly differentiating between "causes of action" and "relief." Pet. at 13. To support the existence of a conflict, Avondale must of necessity redefine the plain meaning of language employed by this Court in *Meghrig*. Avondale's

argument presupposes that when this Court used the word "remedy," this Court sometimes meant to say "remedy" and at other times meant to say "cause of action." According to Avondale, the Seventh Circuit's "misinterpretation seems to rest on this Court's use of the word 'remedy' in the *Meghrig* opinion sometimes to mean cause of action and sometimes to mean relief." *Id.* Based on its redefinition of remedy, Avondale accuses the Seventh Circuit of somehow confusing the concepts of "cause of action" and "relief," and "blurring the distinction between cause of action and injunctive relief." Pet. at 13, 16. To the contrary, the Seventh Circuit correctly interpreted this Court's *Meghrig* decision.

The Seventh Circuit properly began its analysis by reviewing the congressional purpose of the RCRA citizen suit provision which, as stated by this Court in *Meghrig*, "is not directed at providing compensation for past clean-up efforts." *Id.* at 484. Further, the Seventh Circuit correctly noted that RCRA permits a private party two remedies: a mandatory injunction or a prohibiting injunction to address an imminent and substantial endangerment. *Id.* Because neither remedy was available, the Seventh Circuit correctly held that the case was properly dismissed.

Avondale argues that the Seventh Circuit, by stating that a claim for injunctive relief under RCRA requires the existence of an imminent and substantial endangerment, was confusing a jurisdictional requirement with the scope of the statute's remedy. Pet. at 16. This is not accurate. Instead, the Seventh Circuit correctly ruled that, under the mootness doctrine, a plaintiff must continue to have a remedy available to it throughout the

course of litigation. *See Avondale Fed. Sav. Bank v. Amoco Oil Co.*, 170 F.3d 692, 694 (7th Cir. 1999); App. A at 5a. As a practical matter, once a party abates the imminent and substantial endangerment giving rise to a RCRA citizen suit, the claim is extinguished because no remedy remains.[4] Avondale's misinterpretation of the Seventh Circuit's opinion does not provide a basis for this Court to grant certiorari.

To avoid discussing why its claim was not rendered moot, Avondale invents a theory that its claim for relief was somehow "transmuted by the force of circumstances" during the course of litigation. Pet. at 16. Avondale offers no support for its claim that a prayer for relief somehow can be "transmuted," much less how a prayer for relief can be "transmuted" into a remedy not provided by a particular statute. Both the District Court and the Seventh Circuit held that RCRA did not provide a cost recovery remedy, and therefore held that the case should be dismissed as moot. These courts' rulings do not suggest confusion over the distinction between a cause of action and a remedy; rather they demonstrate a proper understanding of the specific relief provided by RCRA.

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[4] Thus, Avondale's reliance upon *Atlantic States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814 (7th Cir.), *cert. denied*, 118 S.Ct. 442 (U.S. 1997), is wholly inexplicable. The Seventh Circuit's *Atlantic States* case involved a claim under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, for injunctive relief and civil penalties, remedies expressly provided by the statute. However, the Seventh Circuit noted that the defendant's compliance with the Clean Water Act could moot the plaintiff's injunctive claim. *Id.* at 820. Thus *Atlantic States* is not an example of an instance where the equitable remedy available to a plaintiff changes.

CONCLUSION

For the reasons stated, Avondale has failed to demonstrate the importance of this case or otherwise justify this Court's review. Therefore, the petition should be denied.

August 20, 1999

Respectfully submitted,

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